IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. 11-CR-1213-MCA |
| vs. | ) | |
| | ) | |
| **DENNIS J. LOVATO,** | ) | |
| | ) | |
| Defendant. | ) | |

**MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF VOLUNTARY INTOXICATION**

The United States moves the Court to order the Defendant, his counsel, and his witnesses to refrain in the jury's presence from asking any question, introducing any evidence, or making any statement or argument, either directly or indirectly, concerning the Defendant's intoxication on the date forming the basis of the indictment in this case. The United States submits that this motion is amenable to pretrial determination under Federal Rule of Criminal Procedure 12(b)(2) and one that should be determined prior to trial under Rule 12(d). In support of this motion, the United States sets forth the following:

On April 15, 2011, the Defendant was arrested and eventually charged with second degree murder. At the time of the Defendant's arrest, he was under the influence of alcohol. Given that the Defendant is charged with second degree murder, a general intent crime, his intoxication is not relevant to negating any of the elements of the charge against him and should be excluded from trial. This is true even if the Defendant seeks to advance a voluntary and/or involuntary manslaughter theory of defense, as both are also crimes of general intent.[1]

[1] The United States has reason believe that the Defendant may seek to introduce evidence in support of the lesser included offenses of voluntary and/or involuntary manslaughter. In addressing these lesser included offenses in this motion, the United States is not conceding that the Defendant is entitled to introduce evidence of these offenses.

The Tenth Circuit has held repeatedly that voluntary intoxication is not a defense where the crime is one of general intent. *United States v. Smith*, 606 F.3d 1270, 1281 (10th Cir. 2010) (noting that "voluntary intoxication is no defense to a general intent crime"); *United States v. Williams*, 403 F.3d 1188, 1194 (10th Cir. 2005) ("Voluntary intoxication is a defense to a crime requiring proof of specific intent, but not to a crime requiring only proof of general intent."). Second degree murder, voluntary manslaughter, and involuntary manslaughter are all crimes of general intent. *United States v. Hatatley*, 130 F.3d 1399, 1405 (10th Cir. 1997) (recognizing second degree murder and voluntary manslaughter to be general intent crimes); *United States v. Bald Eagle*, 849 F.2d 361, (8th Cir. 1988) (recognizing involuntary manslaughter to be a general intent crime); *c.f. United States v. Brown*, 287 F.3d 965, 974-75 (10th Cir. 2002) (observing that second degree murder is a general intent crime and that the distinction between it and involuntary manslaughter is the degree of reckless/wanton behavior). The Tenth Circuit has explicitly cautioned that evidence of voluntary intoxication is "irrelevant, if not entirely improper in relation to general intent crimes such as second degree murder and voluntary manslaughter where intoxication is no defense." *Hatatley*, 130 F.3d at 1405; *see also United States v. Soundingsides*, 820 F.2d 1232, 1242 (10th Cir. 1987). For the same reason, evidence of voluntary intoxication is equally improper in the context of involuntary manslaughter. *See United States v. McMillan*, 820 F.2d 251, 258 (8th Cir. 1987) (finding that involuntary manslaughter "is a general rather than a specific intent crime and voluntary intoxication is not a defense to general intent crimes"); *United States v. Kuneki*, 1993 WL 210679, at *2 (9th Cir. June 15, 1993) (same).

Accordingly, because second degree murder is a general intent crime (as are the lesser-included-offenses of voluntary and involuntary manslaughter) this court should prohibit the

Defendant from confusing the jury with irrelevant evidence concerning his intoxication. Furthermore, the United States intends to submit for the Court's consideration an instruction that explains to the jury that voluntary intoxication is no defense to the crime with which the Defendant is charged.

For the foregoing reasons, the United States respectfully requests that the Court grant this motion and order the Defendant, his counsel, and his witnesses to refrain in the jury's presence from asking any question, introducing any evidence, or making any statement or argument, either directly or indirectly, about the Defendant's voluntary intoxication.

Respectfully Submitted,
KENNETH J. GONZALES
United States Attorney

*/s/*
MARK T. BAKER
HOLLAND S. KASTRIN
Assistant U.S. Attorneys
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to defense counsel and probation.

*Filed Electronically 8/1/2013*
HOLLAND S. KASTRIN
Assistant United States Attorney